Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of Section 103 of the STELA Reauthorization Act of 2014	)	MB Docket No. 15-216
	)	
	)	
Totality of the Circumstances Test	)	
	)	

COMMENTS OF VERIZON[1]

The Commission should implement much-needed reforms to the broken retransmission consent regime. In the five years since the Commission initiated proceedings to review its existing rules, consumers have continued to suffer increases in pay-TV rates resulting from escalating retransmission consent fees and increasing instances of threatened and actual blackouts of broadcast programming. For example, in one ongoing negotiation with a broadcaster that controls affiliates of the Big Four networks around the country, Verizon received a demand for an immediate 100+% increase in retransmission consent fees with additional increases in succeeding years of the agreement. And these increases were in addition to substantial increases from the last round of renewals. The rapid escalation in the price to obtain popular broadcast programming – and the increasing frequency of blackouts when distributors resist – harms consumers and demonstrates that the retransmission consent regime is broken and needs reform.

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[1] The Verizon companies participating in this filing ("Verizon") are the regulated, wholly-owned subsidiaries of Verizon Communications Inc.

The escalating prices of broadcast content and threats of blackouts of broadcast station signals arise at least in part because broadcasters enjoy *both* existing regulatory preferences that distort the marketplace *and* a government-backed monopoly on access to desired programming within their local service areas. And, as additional distribution platforms become available, broadcasters' power over multichannel video programming distributors (MVPDs) increases because they have multiple paths for reaching the viewing public in their communities. With directions from Congress to reexamine its totality of the circumstances test, the Commission can and should adopt reforms to restore some balance to broadcaster-MVPD negotiations and continuity to consumer access to broadcast station programming.

The records compiled in recent proceedings concerning retransmission consent already explain the problems facing MVPDs and the need for specific changes to the Commission's *per se* good faith negotiation standards and totality of the circumstances test. For example, the Commission should use this opportunity to address unreasonable "bundling" of rights for retransmission of a broadcast station signal with other programming. Verizon encounters such requests frequently; indeed, a broadcaster recently asked Verizon to carry two yet-to-be launched cable networks as a condition of retransmission consent for the broadcast station. Such bundling requirements can limit an MVPD's discretion in selecting its preferred package of channels and may force subscribers into taking packages with channels they would otherwise not purchase. The Commission should also adopt a rule requiring a standstill in negotiations as long as the broadcaster and MVPD parties are continuing to negotiate in good faith. Congress has provided the Commission with legal authority to reform this broken regime so that it will better serve consumers.

I. THE COMMISSION SHOULD REFORM THE BROKEN RETRANSMISSION CONSENT REGIME.

For the past five years, the Commission has been considering reforms to its rules implementing the good faith negotiation requirements of Section 325(b) of the Communications Act.[2] Verizon and other MVPDs have filed several sets of comments detailing how the rising costs of broadcast station programming and increasing blackouts of broadcast station signals harm consumers of MVPD services through increased subscription prices and periodic loss of desired programming.[3] Through these several rounds of comments, the Commission has received a number of proposals that, if adopted, could be effective at remedying these harms and restoring certainty to consumers that they can rely on receiving broadcast station programing at reasonable prices from their choice of MVPD. The Commission sought comment on many of these proposals in the *NPRM*.[4]

Verizon continues to back proposals that would restore balance to retransmission consent negotiations, including the standstill requirement discussed in Section II. In addition:

- The Commission should use its good faith standards to address unreasonable "bundling" of rights for retransmission of a broadcast station signal with other programming. A program owner may require, directly or indirectly through the

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[2] *See Amendment of the Commission's Rules Related to Retransmission Consent*, Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd 3351 (2014); *Amendment of the Commission's Rules Related to Retransmission Consent*, Notice of Proposed Rulemaking, 26 FCC Rcd 2718 (2011); *Media Bureau Seeks Comment on a Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent*, Public Notice, 25 FCC Rcd 2731 (2010).

[3] *See* Exhibit A: Comments of Verizon, MB Docket No. 10-71 (June 26, 2014) ("June 2014 Verizon Comments"); Comments of Verizon, MB Docket No. 10-71 (May 27, 2011); Comments of Verizon, MB Docket No. 10-71 (May 18, 2010); *see also* Exhibit B: Comments of Verizon on Mediacom Petition, RM-11728 (Sept. 29, 2014) ("Verizon Mediacom Comments").

[4] *Implementation of Section 103 of the STELA Reauthorization Act of 2014; Totality of the Circumstances Test*, Notice of Proposed Rulemaking, 30 FCC Rcd 10327, ¶¶ 13-16 (2015) ("*NPRM*"); *see also* STELA Reauthorization Act of 2014, Pub. L. No. 113-200, § 103(c), 128 Stat. 2059 (2014) (directing Commission to initiate rulemaking to reexamine its totality of the circumstances test).

economics of pricing, the purchase of a bundle of programming that includes the must-have broadcast station programming with less desirable programming channels that the MVPD might not otherwise choose to pursue. Such bundling requirements can limit an MVPD's discretion in selecting what it feels is the best lineup or package of channels for its subscribers and may force subscribers into taking packages with channels they would otherwise not purchase.[5]

- The Commission should eliminate its network non-duplication and syndicated programming exclusivity rules. These rules intrude into market-based remedies and disadvantage MVPDs by making it nearly impossible to import an out-of-market station when the local station withholds retransmission consent for must-have broadcast programming.[6]

- The Commission should find a violation of the good faith standard when a broadcaster expands programming blackouts to include customers of an MVPD's affiliated Internet access services. Such customers may not subscribe to the MVPD's video service, or may reside in a different local market, and so this action serves only to harm another set of customers who may pressure the MVPD to accede to the broadcast station's demands.[7]

- During negotiations, informing consumers of potential disputes may be unobjectionable, but running one-sided scare advertisements that encourage consumers to place pressure on MVPDs is not, and should be deemed not negotiating in good faith.[8]

Verizon has previously explained in more detail the need for these reforms and the consumer benefits that would flow from them, and is incorporating its most recent filings with these recommendations into this docket.[9] In addition, the American Television Alliance (ATVA) and USTelecom are providing updated details on the market failure in retransmission consent negotiations and proposals to restore balance to retransmission consent negotiations. Verizon supports these efforts to update the good faith negotiating standards to address some of the problems that have emerged.

[5] *See* Exhibit B: Verizon Mediacom Comments, at 8-9.
[6] *See* Exhibit A: June 2014 Verizon Comments, at 5-8.
[7] *See id.* at 10-11.
[8] *See id.* at 10.
[9] *See* Exhibit A: June 2014 Verizon Comments; Exhibit B: Verizon Mediacom Comments.

II. THE COMMISSION SHOULD ADOPT A STANDSTILL REQUIREMENT TO PREVENT CONSUMERS FROM LOSING BROADCAST STATION PROGRAMMING.

To protect consumers from programming disruptions, the Commission should adopt a standstill requirement that maintains the *status quo* and allows continued carriage of a broadcast station signal as long as the parties are engaged in good-faith negotiations for renewal of a retransmission consent agreement. As the Commission noted in the *NPRM*, MVPDs have submitted a number of proposals for strengthening the good faith standards for retransmission consent negotiations, including new *per se* standards for negotiating conduct and proposals to make the totality of the circumstances test more useful. While incorporating these proposals into the Commission's good faith standards will help, a critical part of any retransmission consent reform is a standstill requirement that would provide for automatic interim carriage pending completion of renewal negotiations. A standstill requirement ensures that consumers will not lose access to desired broadcast station programming while the parties continue to negotiate in good faith.

The Commission has recognized the benefits of a standstill requirement in the context of program access complaints. It noted that a standstill requirement has "several benefits, such as minimizing the impact on subscribers who may otherwise lose valued programming pending resolution of a complaint," and "limiting the ability of vertically integrated programmers . . . to withhold[] programming to extract concessions from an MVPD during renewal negotiations."[10] And in the merger context, the Commission has allowed MVPDs to invoke a standstill requirement in program access disputes to ensure continued carriage of programming while the

[10] *Review of the Commission's Program Access Rules and Examination of Program Tying Arrangements*, First Report and Order, 25 FCC Rcd 746, ¶ 71 (2010).

parties continue to negotiate.[11] The same benefits hold true for retransmission consent negotiations.

III. THE COMMISSION HAS THE LEGAL AUTHORITY TO ADOPT EFFECTIVE RETRANSMISSION CONSENT REFORMS.

The plain language of Section 325(b)(3)(A) provides the Commission with legal authority to provide the protections described above for consumers and participants in retransmission consent negotiations. Congress authorized the Commission "to establish regulations to govern the exercise by television broadcast stations of the right to grant retransmission consent," and extended the same good faith obligations to MVPDs.[12] The proposals for expansion of the good faith obligations cited above fall squarely within the scope of the Commission's authority.

Section 325(b)(3)(A) also includes specific mandates that direct the Commission to adopt regulations that will protect the interests of consumers. Congress stated that the Commission "*shall* consider . . . the impact that the grant of retransmission consent by television stations may have on the rates for the basic service tier and *shall* . . . ensure that the rates for the basic service tier are reasonable."[13] The current retransmission consent regime fails to protect consumers. Consumers now face increases in basic cable rates due to unreasonable demands by broadcasters for inflated retransmission fees and blackouts when MVPDs balk at paying such rates. In light of Section 325(b)(3)(A)'s mandatory language, the Commission has an affirmative obligation to ensure that good faith negotiations lead to reasonable basic cable rates.[14]

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[11] *See Comcast Corp., General Electric Co., and NBC Universal, Inc.*, Memorandum Opinion and Order, 26 FCC Rcd 4238, App. A, § VII(A)(5) (2011).
[12] *See* 47 U.S.C. § 325(b)(3)(A); *id.*, §§ 325(b)(C)(ii-iii).
[13] 47 U.S.C. § 325(b)(3)(A) (emphasis added).
[14] *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order, 8 FCC Rcd 2965, ¶ 176 (1993) (recognizing that the Commission must consider "the impact that retransmission consent may have on cable basic service tier rates and to

Despite this statutory language, the Commission to date has taken a narrow view of its role as ensuring good faith only for *the process of the negotiation* – the rules under which the negotiation occurs.[15] The Commission claimed that Congress intended such a limited role, concluding that "[t]he statute does not appear to contemplate an intrusive role for the Commission with regard to retransmission consent" and "Congress clearly did not intend the Commission to sit in judgment of the terms of every retransmission consent agreement executed between a broadcaster and an MVPD."[16]

But Section 325(b) on its face does not so narrowly restrict the Commission's role. The legislative history of the STELA Reauthorization Act confirms that the Commission has authority under Section 325(b) to address the aspects of retransmission consent negotiations discussed above. Congress intended the update to the totality of the circumstances test to enable the Commission to "take a broad look at *all facets* of how both television broadcast station owners and MVPDs approach retransmission consent negotiations to make sure that the tactics engaged in by both parties meet the good faith standard."[17] And Congress expected "the FCC's totality of the circumstances test to include a robust examination of *negotiating practices*, including whether certain *substantive terms* offered by a party may increase the likelihood of negotiations breaking down."[18]

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ensure that our retransmission consent regulations do not conflict with our obligation ... 'to ensure that the rates for the basic service tier are reasonable'").

[15] *See Implementation of the Satellite Home Viewer Improvement Act of 1999; Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, First Report and Order, 15 FCC Rcd 5445, ¶ 24 (2000) ("*Good Faith Order*") ("Congress intended that the Commission develop and enforce a process that ensures that broadcasters and MVPDs meet to negotiate retransmission consent").

[16] *Id.*, ¶ 13, 23.

[17] S. Rep. 113-322, at 13 (Dec. 12, 2014) (emphasis supplied).

[18] *Id.* (emphasis supplied).

The Commission should recognize that negotiating tactics that result in harms to consumers constitute failing "to negotiate in good faith." For example, a party's refusal to respond in a timely and reasonable manner to a proposal on relevant issues may evidence bad faith. But failing to respond with an economically reasonable offer – one that does not require purchase of a bundle of affiliated cable channels to retransmit the broadcast station signal – is just as much an impediment to the negotiation as failing to respond to an offer in a timely manner. And while failing to meet to negotiate at reasonable times and locations may constitute bad faith, threatening to turn off programming the day before a marquee event (*e.g.*, the Super Bowl), is behavior that a broadcaster designs solely to misdirect the negotiation – just as much as refusing to meet except at midnight. The Commission should deem such impediments to negotiations as *per se* evidence of bad faith.

Similarly, the Commission could use its "totality of the circumstances" test to review demands or behavior by broadcasters and MVPDs that unduly and/or unfairly disrupt the goal of ensuring consumer access to broadcast programming. In its current format, the Commission has set the bar for that test so high that it is of limited value and cannot address "through the back door" many negotiating tactics employed by broadcasters.[19] For example, the Commission does not have to dictate what the price for retransmission should be, but it can give guidance as to what types of offers constitute good faith negotiating tactics in reaching that price point.

Using the Commission's existing authority to adjust the retransmission consent rules to better address current practices that harm consumers will further Congress's purposes in enacting Section 325(b)(3)(A). Congress enacted that statute to ensure that consumers could continue to

[19] *See Good Faith Order*, ¶ 32.

access network programming, enjoy the benefits of localism and viewpoint diversity, and do so at reasonable rates and without blackouts of local broadcast signals.[20]

IV. CONCLUSION.

For the reasons set forth above, the Commission should find the public interest demands that it adopt targeted reforms to the retransmission consent regime, for both its *per se* standards and its totality of the circumstances test.

Respectfully submitted,

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[20] *See* Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 2(b)(1), 106 Stat. 1460 (1992) (the purpose of the 1992 Cable Act is to "promote the availability to the public of a diversity of views and information through cable television and other video distribution media").

EXHIBIT A

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Amendment of the Commission's Rules	)	MB Docket No. 10-71
Related to Retransmission Consent	)	

COMMENTS OF VERIZON

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COMMENTS OF VERIZON[1]

I. INTRODUCTION AND SUMMARY.

The current retransmission consent regime skews commercial negotiations by providing television broadcast stations with leverage over Multichannel Video Programming Distributors (MVPDs) through various artificial regulatory preferences. The result of this imbalance in negotiations for retransmission fees is harm to consumers through higher cable rates and increasingly frequent service disruptions. The Commission again proposes to eliminate two of these preferences, the network non-duplication and syndicated programming exclusivity rules,[2] which "heighten the leverage" for broadcasters "because MVPDs may be prohibited from importing out-of-market broadcast stations carrying the same network programming as the broadcast stations at issue in the negotiations."[3] It is time for the Commission to eliminate these anti-consumer rules.

Ideally, Congress and the Commission would eliminate all rules that prevent the marketplace for distribution of broadcast station programming from functioning like a normal

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[1] The Verizon companies participating in this filing (Verizon) are the regulated, wholly-owned subsidiaries of Verizon Communications Inc.

[2] *See* 47 C.F.R. §§ 76.92 *et seq.* (network non-duplication); 47 C.F.R. §§ 76.101 *et seq.* (syndicated programming).

[3] *Amendment of the Commission's Rules Related to Retransmission Consent*, Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd 3351, ¶ 13 (2014) (*Retrans. Order* or *Retrans. FNPRM*).

market, including the network non-duplication and syndicated programming exclusivity rules and others that distort negotiations. But eliminating these two sets of rules would be a good start and would encourage parties to retransmission consent negotiations to temper their demands and, by providing potential market-based alternatives, reduce the likelihood of consumer harm in the event negotiations between a broadcast station and MVPD reach an impasse. Accordingly, Verizon supports elimination of these two rules as an important interim step in developing a true, market-based approach to retransmission consent.

II. THE RETRANSMISSION CONSENT REGIME IS BROKEN AND REQUIRES COMPREHENSIVE REFORM.

As Verizon and other commenters have pointed out in this docket,[4] the current retransmission consent regime is resulting in higher cable rates and increased service disruptions, and thereby is not working to benefit consumers. These adverse effects arise in large part because various governmental regulations provide substantial advantages during negotiations to television broadcasters. In the typical market-based context, both sides can seek compensation for their goods and services, and, if those negotiations are unsuccessful, either party can decide to walk away and pursue other distribution sources. However, retransmission consent negotiations are conducted under substantially different dynamics – skewed to advantage broadcast stations –with the results that MVPDs are increasingly paying over-market fees to retransmit broadcast programming and consumers are frequently cut off from desired programming.

Unlike most businesses, broadcast stations enjoy several government-granted preferences that prevent more balanced, market-based negotiations. In addition to guaranteeing broadcasters the right to cable carriage, should they unilaterally decide to assert it, the Commission's rules

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[4] *See*, *e.g.*, Comments of Verizon, MB Dkt. No. 10-71 (May 27, 2011); Comments of AT&T, MB Dkt. No. 10-71 (May 27, 2011).

give broadcasters a number of powerful distribution preferences, including the network non-duplication and syndicated exclusivity rules. Other such preferences include guaranteed placement in the basic tier[5] and protection from deleting a station during the sweeps period even if the retransmission consent agreement has expired,[6] while MVPDs hold no analogous rights. By virtue of these regulatory preferences, normal marketplace dynamics cannot function as they would absent the regulations.

As an initial matter, an MVPD generally cannot refuse to carry a broadcaster's programming if the station elects to demand compulsory carriage ("must carry"). And for broadcasters that pursue retransmission consent and then make unreasonable demands, the MVPD cannot pursue effective alternative arrangements to carrying the broadcast programming that is the subject of the negotiations because of the broadcast station's network non-duplication and syndicated exclusivity rights. So, for example, an MVPD cannot seek an alternative source for network programming from an out-of-market broadcaster that may be willing to offer the programming on different terms, because the network non-duplication rules prevent the MVPD from delivering the out-of-market programing to consumers if the local broadcaster asserts these rights. Even if the local broadcaster refuses to let the MVPD retransmit its programming when negotiations break down, it can still block carriage of out-of-market stations with the same programming.[7] Thus, an MVPD is generally limited to a single input for the network or syndicated programming that consumers expect to receive.

By preventing true marketplace negotiations and curtailing potential alternative sources for many forms of popular programming, the current retransmission consent rules harm consumers. As has been noted multiple times in the last few years, some broadcasters have

[5] *See* 47 C.F.R. § 76.56(d).
[6] *See* 47 C.F.R. § 76.1601 note 1.
[7] *See Retrans. FNPRM*, ¶ 41 note 140.

relied on the preferences afforded under the current regime to demand increased payments from MVPDs for programming and to threaten to pull – or actually pull – their signal if their demands are not met.

When faced with such demands, MVPDs essentially have two choices. They can pay the higher fees demanded. The result, as Chairman Wheeler recently recognized, is that the costs of retransmission consent agreements have "skyrocketed from $28 million in 2005 to $2.4 billion in 2012, a nearly 8,600 percent increase in seven years."[8] SNL Kagan has projected that retransmission consent fees will reach $7.15 billion by 2018.[9] Or, in the alternative, MVPDs can refuse the broadcasters' demands, but risk exposing their customers to a loss of desired programming (often during periods when they are most in demand, such as during popular sporting events). Like the rising retransmission fees, the occurrence of programming disruptions has escalated each year: there were reported more than 120 broadcaster blackouts in 2013, up from just a dozen in 2010.[10] The impact of these threats of service disruption have recently been heightened by broadcasters also blocking Internet access to their programming for the MVPD's customers,[11] spreading the impact to consumers who may not even subscribe to the MVPD's video service.

The current retransmission consent regime thus not only threatens competition in the video marketplace, it also is having a real and deleterious impact on consumers, who, the

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[8] Tom Wheeler, FCC Chairman, "Protecting Television Consumers by Protecting Competition" (Mar. 6, 2014), *available at* http://www.fcc.gov/blog/protecting-television-consumers-protecting-competition.
[9] See "SNL Kagan Releases Updated Industry Retransmission Fees Projections" (Nov. 22, 2013), *available at* http://www.fiercecable.com/press-releases/snl-kagan-releases-updated-industry-retransmission-fee-projections.
[10] *See* Mike Reynolds, "American Television Alliance: 2013 Sets Record for Retrans Blackouts," Multichannel News (Dec. 31, 2013), *available at* http://www.multichannel.com/distribution/american-television-alliance-2013-sets-record-retrans-blackouts/147429.
[11] *See*, *e.g.*, J. Roettgers, "Viacom blocks online videos in retrans fight, wakes up regulators," *GigaOm* (May 24, 2014), *available at* http://gigaom.com/2014/05/23/comedy-central-mtv-blocked-cable-one-voacom-retrans-fight/; Letter from Marc Lawrence-Apfelbaum, Time Warner Cable Inc. to Marlene H. Dortch, FCC, MB Dkt. No. 10-71 (Oct. 17, 2013).

Commission recognizes, are the "innocent bystanders adversely affected" by blackouts resulting from stalemates in negotiations between broadcasters and MVPDs.[12] And, in the case of competitive MVPDs like Verizon, the risks are especially great, given the prospect of losing customers to an incumbent cable operator, or discouraging the interest of potential new customers, if the MVPD does not accede to the broadcast stations' demands to ensure continued availability of desired programming. Eliminating the leverage provided by the network non-duplication and syndicated exclusivity rules will help ameliorate these harms to consumers and programming distribution services.

III. THE NETWORK NONDUPLICATION AND SYNDICATED PROGRAMMING EXCLUSIVITY RULES ARE NO LONGER NEEDED TO PROTECT THE COMPETITIVE POSITION OF TV BROADCAST STATIONS.

The Commission's network non-duplication and syndicated programming exclusivity rules have the effect of preventing a video distributor from importing broadcast programming from alternative sources when negotiations breakdown with a local broadcast station owner. Thus, a broadcast station can negotiate retransmission consent knowing that a blackout may result in the loss of programming valuable to subscribers, but MVPDs are prohibited by governmental regulations from obtaining such programming from other sources.

For example, pursuant to the network non-duplication rule, an MVPD and its subscribers could lose access to a national network's primetime programming in the event of an impasse with a local network affiliate. Or, in the case of syndicated programming, the MVPD and its subscribers could lose access to syndicated re-runs of popular programming, not available on another local broadcast station. These rules effectively make one broadcast station the sole source of certain programming, and so the station enters into retransmission consent negotiations

[12] *Amendment of the Commission's Rules Related to Retransmission Consent,* Notice of Proposed Rulemaking, 26 FCC Rcd 2718, ¶ 17 (2011).

with an upper hand, allowing it to obtain higher fees than those to which it would be entitled if access to such programming was negotiated in a normally functioning marketplace – with multiple sources competing for distribution over an MVPD's network.

The Commission notes that the network non-duplication and syndicated exclusivity rules were adopted at a time when a cable company did not need to obtain consent to retransmit a television broadcast station's signal.[13] A broadcast station, however, may have held geographic exclusivity rights in a contract with either a network or syndicator, which it could enforce against an out-of-market station through whatever contractual remedies were available to it. The addition of the Commission's exclusivity rules enabled the station to enforce those rights against the cable company. According to the Commission's theory, enabling broadcast stations to enforce their territorial rights protected their local audience share and advertising revenues against whatever programming the cable operator may have been able to import.[14]

Today, a cable company or other MVPD cannot carry a television station without its permission in electing either must-carry or retransmission consent rights.[15] The television station may still have contracted-for territorial rights to network and/or syndicated programming, which may prevent an out-of-market station from authorizing a cable company to carry the programming within the local station's territory. Accordingly, to the extent that a broadcast station holds territorial rights to transmit network or syndicated programming, it can still enforce those rights against carriage of an out-of-market station – without the Commission's rules.

However, by giving broadcast stations an "extra-contractual" method to enforce their territorial rights against MVPDs, the Commission's rules have the effect of reducing the costs and burden of pursuing whatever territorial rights a television station may hold. The station

[13] *See Retrans. FNPRM*, ¶ 58.
[14] *See id.*
[15] *See id.*

simply has to notify the MVPD of its contractual rights, without having to present a case against carriage of out-of-market programming, or to justify denying consumers access to the network or syndicated programming altogether.[16]

Moreover, the Commission's rules allow the local broadcast station to usurp the bargaining rights of an out-of-market broadcast station that may be a competitive alternative or at least a partial substitute for the negotiating MVPD and its subscribers, by precluding the MVPD from negotiating with the out-of-market station. As a result, there is less – or no – competition for the programming for the MVPD seeking to provide network or syndicated programming to its customers. Although this scenario has been in place for over two decades, the Commission recently noted in its *Report and Order* that "'any effort to stifle competition through the negotiation process would not meet the good faith negotiation requirement' imposed by Congress."[17] Assuming the Commission has correctly read the Congressional intent behind Section 325(b) of the Communications Act (47 U.S.C. § 325(b)), it appears inapposite for the Commission to maintain these programming preferences that effectively eliminate any competitive negotiation process for alternative sources of programming.

At bottom, this intrusion into the market-based remedies available to the broadcast station primarily disadvantages MVPDs by making it easy for the broadcast station to enforce its contractual rights with a network or syndicator without even turning to its contractual remedies. As result, it is nearly impossible for an MVPD to import an out-of-market station, when the local station withholds consent, assuming, of course, that the out-of-market station could authorize and

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[16] *See* 47 C.F.R. §§ 76.94, 76.105.

[17] *Retrans. Order*, ¶ 20, *quoting Implementation of the Satellite Home Viewer Improvement Act of 1999; Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, First Report and Order, 15 FCC Rcd 5445, ¶ 58 (2000).

consent to retransmission.[18] While it is by no means clear that the results for the MVPD would be different if these rules are eliminated, it is clear that the presence of the rules "heightens the leverage" available to the broadcast station in negotiations.

These rules also harm consumers. The Commission has recently recognized that consumers are starting to benefit from the changing video marketplace: "[T]oday consumers may choose among several MVPDs and also may access video programming on the Internet."[19] Yet, while the competitive marketplace offers increased choices for consumers, the Commission's rules can effectively take those choices away. An MVPD that declines to pay increased retransmission consent fees may find itself without desired programming, thereby handicapping its ability to offer a competitive choice to consumers. Or, it may pay the increased fees, resulting in higher cable rates for consumers, perhaps providing a less attractive option for new subscribers. Either way, the options available to consumers may be stifled.

Accordingly, eliminating the network non-duplication and syndicated programming exclusivity rules will potentially inject a competitive factor into the conditions under which MVPDs negotiate retransmission consent with broadcast stations. The parties may still reach impasses, but, at least, the negotiation would be conducted closer to market-based conditions, and the broadcast station may be more hesitant to disrupt programming if it knows that it cannot stop the MVPD from carrying substitute programming, or that it will have to institute litigation to prevent such a result.

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[18] *See Retrans. FNPRM*, ¶ 58 ("given the prohibition on unauthorized retransmission of broadcast stations, a distant station would have to agree to be imported . . . and . . . contractual arrangements between networks and their affiliates may bar a broadcaster from agreeing to the importation of its distant signal").

[19] *Id.*, ¶ 60.

IV. ELIMINATING EXCLUSIVE PROGRAMMING PREFERENCES SHOULD BE THE FIRST STEP IN COMPREHENSIVE REFORM OF THE CABLE CARRIAGE REGIME.

Given the consumer harms that have developed from the current retransmission consent regime, ideally, policymakers would initiate comprehensive reforms to establish a different approach, appropriate for the video marketplace of today and tomorrow. Such an approach should take into account the growing array of video choices now available to consumers and should rely on consumer choice and competition to govern the video marketplace in the first instance, with regulation generally reserved for targeted issues.[20] In pursuit of this holistic approach, Congress and the Commission should work to restore balance to retransmission consent negotiations, and to eliminate the mandates instituted over the past 20 years that prevent the marketplace for broadcast programming from functioning like a normal competitive market. By eliminating outdated regulations that are no longer needed in today's vibrant video marketplace, broadcast stations and MVPDs would be able to negotiate on an equal footing, and the current impulse toward posturing and stalemates would become much less attractive, thereby reducing the likelihood of consumer harm in the event such negotiations are unsuccessful.

Verizon supports the Commission's efforts in moving forward with targeted reforms while a more comprehensive approach is considered to address the problems with the current regime. Eliminating the network non-duplication and syndicated programming exclusivity preferences would be an important step in the right direction to fix the artificial imbalance in negotiating strengths resulting from the preferences available to broadcast stations in the current retransmission consent regime. While rendering a completely level playing field would require action by Congress, which has the authority necessary to change the broadcast station preferences embodied in the Communications Act, and by other policymakers, such as the

[20] *See*, *e.g.*, Comments of Verizon, MB Dkt. 14-16, at 3-9 (Mar. 21, 2014).

Copyright Office, simply giving MVPDs an opportunity to seek alternative sources for programming blacked-out by a broadcast station would provide some protections to consumers against service disruptions and increased prices.

Meanwhile, the Commission should continue to pursue additional steps to level the playing field in retransmission consent negotiations pursuant to its statutory authority "to govern the exercise by television broadcast stations of the right to grant retransmission consent."[21] In keeping with its obligation to prohibit a broadcast station from "failing to negotiate in good faith,"[22] the Commission should amend its rules (47 C.F.R. § 76.65(b)) to strengthen the existing set of obligations defining good faith negotiations. For example, negotiating in good faith should require engaging in negotiations at least 60 or 90 days before the expiration of the current agreement, and a party's refusal to respond in a timely and reasonable manner to a proposal on relevant issues should constitute bad faith. Moreover, during negotiations, informing consumers of potential disputes may be warranted, but, running one-sided scare advertisements that encourage consumers to place pressure on MVPDs is not, and should be viewed as not negotiating in good faith.

Additionally, recent tactics by broadcast stations demonstrate that even elimination of preferences such as the programming exclusivity rules may not be sufficient to restore balance to the negotiating table. As noted above, broadcasters have expanded program blackouts to include access to programming by customers of an MVPD's affiliated Internet access services. These customers may not even subscribe to the MVPD's video programming service, or could reside in a different local market, and, may not be able to access substitute broadcast station programming if it were available. Therefore, blacking out Internet access must be designed to harm another set

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[21] 47 U.S.C. § 325(b)(3)(A).
[22] *Id.* § 325(b)(3)(C)(ii).

of customers who may then place pressure on the MVPD to accede to the broadcast station's demands, and should be deemed a failure to negotiate in good faith.

The Commission also has the authority to protect consumers by ensuring "that the rates for the basic [cable] service tier are reasonable."[23] Accordingly, it could adopt specific procedures to reduce the likelihood that negotiations result in a disruption of service to consumers. For example, the Commission should implement a mandatory standstill, interim carriage and cooling off period, taking effect when contracts expire for a reasonable period of time, during which parties can continue to negotiate toward a resolution without placing consumers at risk of losing service. By taking these modest steps, the Commission can prevent consumers from experiencing widespread disruptions in service and increased cable rates. Such a step would be consistent with elimination of the network non-duplication and syndicated programming exclusivity rules because it would reflect the Commission's view that consumers should not be held hostage to retransmission consent negotiations, but rather should have access to desired programming even while a broadcast station and MVPD hammer out their differences on the terms and conditions of carriage.

Ultimately, comprehensive reform of the retransmission consent regime should ensure that consumers have competitive options and maintain access to desired programming. Until such reform becomes a reality, the targeted measures noted above can help repair the broken retransmission consent regime and protect consumers from blackouts and increased cable rates.

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[23] *Id.* § 325(b)(3)(A).

V. CONCLUSION.

For the reasons set forth above, the Commission should find the public interest demands that it eliminate its network non-duplication and syndicated programming exclusivity rules.

Respectfully submitted,

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June 26, 2014

EXHIBIT B

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Petition for Rulemaking to Amend	)	RM-11728
The Commission's Rules Governing	)	
Practices of Video Programming Vendors	)	

COMMENTS OF VERIZON

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Before The
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Practices of Video Programming Vendors	)	

COMMENTS OF VERIZON[1]

I. INTRODUCTION AND SUMMARY.

As a competitive provider of video distribution services, Verizon seeks to distinguish itself from the cable incumbents and satellite operators against whom it competes and to offer packages that provide more choices and competitive prices for consumers. In its Petition, Mediacom highlights various content vendor practices that make more difficult these goals of enhancing consumer choice and keeping down prices for pay television services.

Costs for video programming keep rising and constitute a significant part of the cost of providing service for Multichannel Video Programming Distributors (MVPDs) like Verizon and Mediacom. Programming vendors' practices – including their unwillingness to enter alternative arrangements for distribution or payment – contribute significantly to higher costs for consumers and to MVPDs' inability to craft more flexible programming packages that have the potential to better meet consumers' needs. Programmers continue to push larger and larger bundles of channels on MVPDs and their customers, with demands to carry much of this programming on widely subscribed-to tiers regardless of the popularity, consumer demand, or actual viewership for particular channels. These practices result in higher prices and less flexibility for MVPDs

[1] The Verizon companies participating in this filing (Verizon) are the regulated, wholly-owned subsidiaries of Verizon Communications Inc.

who may only want to purchase one or more of the most popular or must-have channels and not the entire suite of programming that the programmer is selling. While competitive MVPDs must continue to offer large and varied packages of programming to subscribers, many of the programmers' practices make it difficult to put together more targeted packages that may appeal to certain consumer segments. Moreover, many of these programmers refuse to consider alternative arrangements – such as basing the amount a distributor pays for a particular channel on the extent to which subscribers actually watch the channel – and instead continue with their practice of raising prices and insisting on wide carriage of less popular channels in order for a distributor to get access on reasonable terms to a programmer's popular content.

Video programmers, including broadcasters, have also shown a willingness to engage in other anti-consumer practices in order to increase the leverage on MVPDs with whom they are negotiating and drive up prices for consumers. For example, some programmers have blocked a provider's Internet access customers from accessing content otherwise available for free and unrestricted on the Internet at times when the affiliated broadcaster and MVPD have yet to reach agreement for distribution on the MVPD's video service. Such tactics may also result in purchase of larger and more expensive bundles of programming and make it more difficult for MVPDs to craft flexible or tailored packages for their customers. Consumers end up bearing the brunt of the harm because they must purchase programming that they may not want – and at higher prices. Under the circumstances highlighted in Mediacom's Petition, it is appropriate for the Commission to take a look at this part of the video distribution marketplace and to consider whether there is a need to take steps to address practices by programming vendors that harm competition and consumer choice and ultimately raise prices.

Verizon supports efforts to make must-have programming available on reasonable terms so consumers can enjoy reasonable rates for MVPD services and more choices among programming and providers. Within the scope of its existing authority, the Commission can take certain actions to improve the availability of video programing on reasonable terms, including:

- Strengthening the list of practices deemed not negotiating in good faith under Section 325(b) of the Communications Act, or an unfair practice under Section 628, to include blocking of Internet content, depending upon which broadcaster or programmer is responsible for the blackout.
- Adopting policies using its authority under Section 325(b) to curb practices that drive up consumer prices. Such could include a mandatory standstill, interim carriage and cooling off period for a reasonable period of time, taking effect when retransmission consent contracts expire, during which parties can continue to negotiate toward a resolution without placing consumers at risk of losing service.
- Enforcing the program access protections in Section 628 against withholding of programming and discriminatory practices, activities or arrangements to ensure incumbent cable companies that own or control programming do not deprive competitors of access to critical programming.

These modest steps could help curb some of the worst abuses by video programmers and help to facilitate MVPDs' ability to offer more attractive and affordable video services to consumers.

II. AS A COMPETITIVE VIDEO PROGRAMMING DISTRIBUTOR, VERIZON NEEDS REASONABLE ACCESS TO MUST-HAVE PROGRAMMING TO COMPETE IN THE VIDEO PROGRAMMING MARKETPLACE.

Verizon began the rollout of its all-fiber FiOS video network in 2004, and it continues to invest in and deploy this network. Verizon's fiber-optic network is available to approximately 70 percent of the premises in its wireline footprint, or more than 19 million premises.[2] Subscribership to Verizon's FiOS TV service has increased to over 5.4 million, representing a 35% penetration rate among households to which FiOS TV is available. In addition, Verizon FiOS has over 6 million broadband customers, a 40% penetration rate.[3]

Verizon is a competitive MVPD in all areas where it has deployed its fiber-optic network to deliver FiOS TV. In turn, Verizon faces competition from the incumbent cable operators in these areas that offer video, broadband and voice services as well as two national Direct Broadcast Satellite (DBS) providers. Consumers can also access video programming from online video providers, such as Netflix, Hulu, iTunes, Amazon Video, Apple TV, Roku, YouTube, and others, as well as cable operators who are offering consumers Internet-based applications to watch video content.[4]

Verizon and most of its cable and DBS competitors now offer hundreds of linear video channels and tens of thousands of movie and TV titles on demand. At the same time, it remains true that much of the most valuable programming – including must-have programming such as

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[2] *See* Verizon, *2014 Investor Quarterly: Second Quarter*, at 6 (July 22, 2014), *available at* http://www.verizon.com/about/investors/quarterly-reports/2q-2014-quarter-earnings-conference-call-webcast/.

[3] Verizon's current FiOS Internet offerings range from 25 Mbps to 500 Mbps downstream, with most customers now subscribing to the FiOS Quantum plans that offer download speeds of 50 Mbps or more. In July 2014, Verizon began upgrading FiOS Internet service so new and existing customers receive upload speeds that match their download speeds, at no extra charge. *See* Verizon News Release, *Verizon's FiOS Customers To Receive Upload Speeds That Match Their Current Download, Setting a New Standard for Fast Internet Service and Sharing Content* (July 21, 2014), *available at* http://www.verizon.com/about/news/verizons-fios-customers-receive-upload-speeds-match-their-current-download-setting-new-0/.

[4] *See, e.g.*, Consumer Electronics Ass'n News Release, "Change Is In the Air: U.S. Households Viewing TV Programming only via the Internet are Poised to Surpass those Viewing only via Antenna, Finds New CEA Study," (June 5, 2014) (nearly half of U.S. TV viewing households watched video on portable computer or smartphone in the last year), *available at* http://www.ce.org/News/News-Releases/Press-Releases/2014/OTA-Study_060514.aspx.

regional sports programming – is still within the control of the cable incumbents, broadcasters, and a small number of other big programmers.[5] For example, last year, the Los Angeles Dodgers organization announced creation of a new regional sports network funded principally by Time Warner Cable to carry Dodgers baseball games starting this year; Time Warner Cable was to be the first distributor and responsible for other programming.[6]

In addition to the hundreds of channels on MVPD systems, consumers have access to competing platforms on which they can view the same video programming. The availability of these platforms allows consumers to pick one that suits their viewing preferences, from a typical scheduled MVPD platform to an unstructured and time-shifted on-line platform. In a marketplace with so many options for consumers, MVPDs must put together an attractive and competitive package of video programming by gaining access to must-have programming that consumers can otherwise reach through one, two or more competitors, and to do so at a reasonable price. The practices Mediacom highlights can make this process challenging for MVPDs, as some programmers seek to continuously increase costs and add more and more programming to widely-subscribed-to tiers.[7]

For its FiOS programming, Verizon has pursued efforts to reach programming arrangements that allow us to better and more cost-effectively, tailor our video offerings to what consumers actually want. For example, Verizon has started to implement more innovative programming arrangements primarily with independent and small programmers that base

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[5] *See*, *e.g.*, D. Thompson, "Mad About the Cost of TV? Blame Sports," *The Atlantic* (Apr. 2, 2013), *available at* http://www.theatlantic.com/business/archive/2013/04/mad-about-the-cost-of-tv-blame-sports/274575/; *see also*, *e.g.*, *Verizon Tel. Cos.*, *et al. v. Madison Square Garden, L.P.*, *et al.*, 26 FCC Rcd 13145 (MB), *rev. denied*, Memorandum Opinion and Order, 26 FCC Rcd 15849 (2011).

[6] *See* D. Rovell, "Dodgers Launching Sports TV Network," ESPN LA (Jan. 29, 2013), *available at* http://espn.go.com/los-angeles/mlb/story/_/id/8889859/los-angeles-dodgers-launching-regional-sports-tv-network-sportsnet-la. *See generally Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, Fifteenth Report, 28 FCC Rcd 10496, ¶¶ 342-47 (2013) (*Fifteenth Video Competition Report*).

[7] *See* Mediacom Communications Corp., *Petition for Rulemaking to Amend the Commission's Rules Governing Practices of Video Programming Vendors*, RM-11728 (filed July 21, 2014) (*Petition*).

payments for distribution on what consumers are actually watching, rather purchasing an entire suite of channels. Yet, many programmers continue their status quo approach that ultimately raises costs and adds programing potentially of less interest to many consumers.

III. MEDIACOM'S PETITION HIGHLIGHTS MANY OF THE ROADBLOCKS COMPETITVE MVPDS FACE IN GAINING REASONABLE ACCESS TO MUST-HAVE PROGRAMMING.

Other than the costs of network deployment, the cost of content acquisition is the most significant cost that an MVPD incurs in providing a video programming distribution service to its subscribers. Several factors noted in Mediacom's Petition contribute to the high cost of programming, including: (1) must-have programming is generally available only from a single source, and there are now only a handful of those sources for all of the most popular programming; (2) programming owners frequently "package" must-have programming with other programming increasing the overall cost to the MVPD's subscribers; and (3) various governmental preferences give program owners substantial leverage in the negotiation process for some must-have programming.

First, large programmers, many affiliated with broadcasters or cable incumbents, remain the source of much of the most popular programming, including must-have programming such as regional sports and local broadcast channels. The video programming available to consumers has become increasingly sophisticated and diversified for specific viewer preferences such that certain programming is essential to a competitive video service. An MVPD must be able to package sufficient programming to present an attractive service for the households in its coverage area. Yet, as Mediacom points out, despite the hundreds of programming channels available in the marketplace, almost all of the most popular programming, indeed, almost all programming in the United States, is sourced from just a half dozen program vendors, most of whom control both some broadcast network programming as well as cable channel programming.[8] This concentration of sources gives programming vendors substantial negotiating power over MVPDs seeking to offer a package of programming that will appeal to consumers.

Sports programming in particular is highly desired and significantly expensive in the current video marketplace.[9] An increasing number of regional sports networks (RSNs), affiliated with the same handful of program producers and/or incumbent cable operators, control access to both professional and collegiate sports programming and demand substantial per-subscriber rates for distribution on non-affiliated MPVD networks.[10] Given the importance of local sports programming to many consumers in the area, and the huge popularity of live sports shows generally,[11] an MVPD is often forced to meet these demands in order to put together a competitive bundle of programming to attract and keep subscribers.[12] Yet, some RSNs demand high per-subscriber fees, refusing distribution agreements that would allow the distributor to limit this programming to those subscribers who are interested in watching it. As a result, many cable companies must decline to carry the channel if it means imposing high fees on <u>all</u> subscribers. Notably, Time Warner Cable was asking such high per-subscriber rate for

[8] *See id.*, at 2; *cf. Fifteenth Video Competition Report*, ¶ 329 (seven companies, six of which are also owners of broadcast stations or a movie studio, account for 95% of television viewing hours in the United States).

[9] *See* D. Thompson, "Mad About the Cost of TV? Blame Sports," *supra* note 5 ("Sports accounts for half of the programming costs of TV"); *Fifteenth Video Competition Report*, ¶ 343 ("broadcast and cable networks . . . pay increasingly large amounts to sports teams for television rights").

[10] *See*, *e.g.*, R. Glier, "Examining the pros and cons of the SEC Network," USA Today (May 31, 2014)(examining market for RSNs in context of new Southeastern Conference sports network owned by ESPN), *available at* http://www.usatoday.com/story/sports/ncaaf/sec/2014/05/31/sec-network-espn-comcast-direct-tv/9812745/.

[11] *See Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, First Report and Order, 25 FCC Rcd 746, ¶¶ 52-53 (2010) (*Program Access Rules Order*).

[12] *See*, *e.g.*, *Verizon Tel. Cos. v. Madison Square Garden*, 26 FCC Rcd 13145, ¶ 29 ("given the non-replicable nature of the content on the MSG HD and MSG+ HD, Verizon has no ability to formulate a viable competitive response that would allow Verizon to compete for the many subscribers that highly value these [sports] networks").

distribution of the Sports Net LA, which carried the Los Angeles Dodgers' games, that many cable companies simply declined to carry the network.[13]

Also, the Commission has recognized that certain incumbent cable companies – who remain some of the few sources for must-have programming – have a strategic incentive to enter into exclusive contracts with their affiliates to deprive competitors of access to critical programming, for example, during the pendency of a program access complaint.[14] Such strategic withholding can be used to leverage better contract terms in tough negotiations because there are no alternative sources. Even if ultimately successful in a program access complaint, a competitive MVPD could still suffer competitive harm as a result of temporary loss of access to programming that is "both non-replicable and highly valued by consumers."[15]

Second, negotiating distribution rights for specific programming channels can be encumbered by demands to carry other channels, which can increase the rates paid for distribution rights of cable programming and result in tiers carrying programming that may be of little interest to most consumers. However, holding rights to must-have programming can heighten the bargaining strength of programmers in negotiations with an MVPD that wants to field a competitive offering.[16] For example, a program owner may require, directly or indirectly through the economics of pricing, the purchase of a bundle of programming that includes the desired channel or channels, as well as various other less desirable channels that the MVPD

[13] *See, e.g.*, J. Flint, "The fight over Dodgers between Time Warner Cable, DirecTV is par for the course," LA Times (Apr. 4, 2014) (Time Warner asking such high per-subscriber rate for LA Dodgers network that many cable companies decline to carry the channel), *available at* http://www.latimes.com/entertainment/envelope/cotown/la-et-ct-dodgers-time-warner-cable-directv-20140404-story.html#page=1. Ultimately, Time Warner agreed to allow a local broadcast station to carry the final six games of the Dodgers' regular season. *See* M. James, "Time Warner to Televise Final Six Dodgers Games on Local TV," LA Times (Sept. 15, 2014), *available at* http://www.latimes.com/entertainment/envelope/cotown/la-et-ct-time-warner-cable-to-televise-final-six-dodgers-games-on-local-tv-20140915-story.html.

[14] *See Program Access Rules Order*, ¶ 71 n.258; *cf. The Regional Sports Network Marketplace*, Report, 27 FCC Rcd 154, ¶18 (2012) (noting FCC finding that vertical integration of cable distribution platforms with programming increases incentive of program owners to discriminate or foreclose against competitive MVPDs.)

[15] *Program Access Rules Order*, ¶ 52.

[16] *See Petition*, at 7-13.

might not otherwise choose to pursue. While offering a large and diverse array of programming is generally important for competitive MVPDs, "bundle inflation" limits their discretion in selecting what they feel is the best lineup or package of channels for their subscribers. Attempting to select only the most popular channels, rather than the entire suite, is frequently met with uneconomic pricing for the selected channels.[17] And alternative pricing arrangements – such as Verizon's proposal to base costs on viewership rather than the MVPD's subscriber base – are usually not viewed with favor. MVPDs can lose even more discretion when the program owner demands placement of the programming in certain basic service tiers.

Third, owners and distributors of broadcast network programming have additional advantages heightened by various regulatory preferences that distort the marketplace for video programming. For the past 20-plus years, MVPDs have had to pay for carriage of over-the-air broadcast programming, either through the compulsory license fees for those stations that exercise "must carry" rights or through payments negotiated through the retransmission consent regime.[18] In other proceedings, Verizon has detailed the perils of negotiating retransmission consent agreements arising from the fact that the Commission's rules implementing the retransmission consent regime give broadcasters a number of powerful distribution preferences, including, for example, the network non-duplication and syndicated exclusivity rules.[19] Other such preferences include guaranteed placement in the basic tier[20] and protection from deleting a station during the sweeps period even if the retransmission consent agreement has expired.[21] MVPDs hold no analogous bargaining rights.

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[17] *See id.*, at 8-9.
[18] *See Amendment of the Commission's Rules Related to Retransmission Consent,* Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd 3351, ¶ 58 (2014) (*Retrans. Order & FNPRM*).
[19] *See* Comments of Verizon, MB Docket No. 10-71 (filed June 26, 2014).
[20] *See* 47 C.F.R. § 76.56(d).
[21] *See* 47 C.F.R. § 76.1601 note 1.

By virtue of these regulatory preferences, normal marketplace dynamics often do not function as they would absent the regulations. For example, an MVPD cannot pursue effective alternative arrangements to carrying the broadcast programming that is the subject of the negotiations because of the broadcast station's network non-duplication and syndicated exclusivity rights. Even if the local broadcaster refuses to let the MVPD retransmit its programming when negotiations break down, it can still block carriage of out-of-market stations with the same programming.[22] Thus, an MVPD is generally limited to a single input for the network or syndicated programming that consumers expect to receive.

As has been noted multiple times in the last few years, some broadcasters have relied on the preferences afforded under the current regime to demand increased payment for must-have broadcast programming and to threaten to pull – or actually pull – their signals if their demands are not met. When faced with such demands, MVPDs essentially have two choices. They can pay the higher fees demanded. The result, as Chairman Wheeler recently recognized, is that the costs of retransmission consent agreements have "skyrocketed from $28 million in 2005 to $2.4 billion in 2012, a nearly 8,600 percent increase in seven years."[23] SNL Kagan has projected that retransmission consent fees will reach $7.15 billion by 2018.[24] Or, in the alternative, MVPDs can refuse the broadcasters' demands, but risk exposing their customers to a loss of desired programming (often during periods when they are most in demand, such as during popular sporting events).

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[22] *Retrans. Order & FNPRM*, ¶ 41 note 140.

[23] Tom Wheeler, FCC Chairman, "Protecting Television Consumers by Protecting Competition" (Mar. 6, 2014), *available at* http://www.fcc.gov/blog/protecting-television-consumers-protecting-competition.

[24] *See* "SNL Kagan Releases Updated Industry Retransmission Fees Projections" (Nov. 22, 2013), *available at* http://www.fiercecable.com/press-releases/snl-kagan-releases-updated-industry-retransmission-fee-projections.

Mediacom details how the outcome of failed negotiations can result in loss of programming, which can severely impact an MPVD.[25] The occurrence of programming disruptions keeps escalating: there were reported more than 120 broadcaster blackouts in 2013, up from just a dozen in 2010.[26] As Mediacom also notes, the impact of these threats of service disruption have recently been heightened by programmers also blocking Internet access to their programming for the MVPD's customers when those customers seek to access it over the Internet,[27] spreading the impact to consumers who may not even subscribe to the MVPD's video service. Broadcasters are not alone in using this tactic; this year there have been instances where a cable programmer blacked out programming for an MVPD's subscribers during negotiations for distribution of non-broadcast channel programming.[28] In the case of competitive MVPDs like Verizon, the risks of such program disruptions are especially great, given the prospect of losing customers to an incumbent cable operator, or discouraging the interest of potential new customers, if the MVPD does not accede to the broadcast station's or other programmer's demands to ensure continued availability of desired programming.

IV. THE COMMISSION SHOULD CONSIDER STEPS TO IMPROVE REASONABLE ACCESS TO VIDEO PROGRAMMING.

The Commission can take several steps to improve MVPDs' access to video programming. For example, the Commission has proposed to eliminate the network non-duplication and syndicated exclusivity preferences.[29] Elimination of these rules would be an

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[25] *See Petition*, at 13.
[26] *See* Mike Reynolds, "American Television Alliance: 2013 Sets Record for Retrans Blackouts," Multichannel News (Dec. 31, 2013), *available at* http://www.multichannel.com/distribution/american-television-alliance-2013-sets-record-retrans-blackouts/147429.
[27] *See, e.g.,* Letter from Marc Lawrence-Apfelbaum, Time Warner Cable Inc. to Marlene H. Dortch, FCC, MB Docket No. 10-71 (filed Oct. 17, 2013) (detailing blackout of CBS owned and operated stations against Time Warner Cable customers in New York, Dallas, Los Angeles and other areas).
[28] *See, e.g.,* M. Farrell, "Viacom Blocks Online Access to CableOne Subs," Multichannel News (Apr. 30, 2014), *available at* http://www.multichannel.com/news/news-articles/viacom-blocks-online-access-cableone-subs/374283.
[29] *See Retrans. Order & FPRM*, ¶¶ 55 *et seq.*

important step in the right direction to fix the artificial imbalance in negotiating strengths resulting from the retransmission consent regime. By providing MVPDs with an opportunity to seek alternative sources for programming blacked-out by a broadcast station, the Commission would help protect consumers against service disruptions and increased prices.

In addition, the Commission can take steps to protect consumers pursuant to its statutory authority in Section 325(b) of the Act "to govern the exercise by television broadcast stations of the right to grant retransmission consent."[30] First, in keeping with its obligation to prohibit a broadcast station from "failing to negotiate in good faith,"[31] the Commission should amend its rules (47 C.F.R. § 76.65(b)) to strengthen the existing set of obligations defining good faith negotiations. For example, a party's refusal to respond in a timely and reasonable manner to a proposal on relevant issues should constitute bad faith. And, while informing consumers of potential disputes is warranted, running one-sided scare advertisements that encourage consumers to place pressure on MVPDs is not and should be viewed as not negotiating in good faith. The Commission should also consider finding lack of good faith negotiations when a broadcaster expands a programming blackout to customers of an MVPD's affiliated Internet access services.[32] These customers may not even subscribe to the MVPD's video programming service, or could reside in a different local market, and, therefore, such action must be designed only to harm another set of customers who may then place even more pressure on the MVPD to accede to the broadcaster's demands.

The Commission also has the authority to protect consumers by ensuring "that the rates for the basic [cable] service tier are reasonable."[33] Accordingly, it could adopt specific

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[30] 47 U.S.C. § 325(b)(3)(A).
[31] *Id.* § 325(b)(3)(C)(ii).
[32] *See Petition*, at 17.
[33] 47 U.S.C. § 325(b)(3)(A).

procedures to reduce the likelihood that negotiations result in a disruption of service to consumers. For example, the Commission should implement a mandatory standstill, interim carriage and cooling off period, taking effect when contracts expire for a reasonable period of time, during which parties can continue to negotiate toward a resolution without placing consumers at risk of losing service. By taking these modest steps under Section 325(b), the Commission can prevent consumers from experiencing widespread disruptions in service and increased cable rates.

The program access protections in Section 628 of the Communications Act (47 U.S.C. § 548) provide another source for the Commission to protect consumers by ensuring that competitive MVPDs have access to the programming their customers demand – much of which remains under the control of cable incumbents – in order to offer a meaningfully competitive alternative MVPD service to consumers. As the Commission has already recognized, protecting access to such programming, especially must-have content like regional sports network programming, continues to be important for facilitating today's growing competition among video programming distributors.[34] Therefore, as a general matter, the Commission should be vigilant in protecting reasonable access to programing held by incumbent cable operators, which will in turn preserve for consumers the ability to select from an array of competitive video programming distributors.

In terms of specifics, there have been changes in the dynamics of the video marketplace that the Commission should consider incorporating into its evaluation of program access complaints based on discrimination. For example, much of the same programming delivered via satellite or by terrestrial means is also delivered over the Internet. If a programming vendor withheld content otherwise available on the Internet from an MVPD's customers, that could be

[34] *See Program Access Rules Order*, ¶¶ 52-55.

deemed an "unfair practice" under the Commission's program access rules.[35] The Commission should consider these and other proposals that could help keep costs for must-have programming reasonable and increase flexibility in consumer choices.

V. CONCLUSION.

The Commission should find that the targeted actions described above would increase competition in marketplace for video programming, and should consider implementing such actions in the context of a new rulemaking.

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[35] *See* 47 C.F.R. §§ 76.1001; 76.1002.